

The appellant then sued the respondent for the sum, but the Federal Court held as the appellant had agreed to accept the offer to settle the amount by the respondent's son, he was precluded from enforcing it against the respondent. But Ali F.J.'s judgment can be distinguished. There, there was a specific representation made by the third party. The defendant's son told the plaintiff that he would discharge the defendant's obligation which offer the plaintiff agreed to accept. This was so clearly stated by the plaintiff himself in the statement of claim. In our case, however, there was no such *agreement* to accept the second defendant's performance in place of the first defendant. I think there was no doubt also that as the section itself provides, there must be *performance* before the section can apply. Once performed, the promisee cannot go again against the promisor, but clearly this was not the case before me because the contract was never performed by the second defendant since the cheques they gave in payment of the debt were all dishonoured. The authorities are clearly in support. In the *Har Chandi Lal & Ors. v. Sheoraj Singh* ⁽²⁾, the Privy Council said: "It need hardly be added that this section applies only when a contract has in fact been performed by a third person." *Pollock & Mulla* (9th Edition page 361) is also to the same effect.

In the circumstances, I would confirm the Order earlier made allowing summary judgment to be entered against the first defendant and costs. It seems to me the first defendant may not be entirely without remedy because they may bring an action against the insurance company, and the latter in turn is entitled under its agreement with the second defendant their agent to be indemnified for any default committed by the agent's officers.

Order accordingly.

Solicitors: *Skrine & Co.; Ong Chin Beng & Associates.*

**A LEONG YEW CHIN t/a WEST MALAYSIA
FROZEN FOOD CO. v. HOCK HUA BANK
BHD.**

[O.C.J. (Abdul Razak J.) April 20, 1984]

[Kuala Lumpur — Civil Suit No. C1073 of 1980]

*Banking — Bills of exchange — Bills dishonoured
by drawee — Bank's refusal to pay drawer/client —
Whether bank was holder in due course or collector.*

The plaintiff was the defendant bank's client. Bills of exchange drawn by the plaintiff were presented to and received by the bank. Later, the bank found them to be dishonoured by the drawee. The bank had earlier credited sums for the amount shown in the Bills to the plaintiff's account. Subsequently the account was debited against the plaintiff, when it was found that the Bills had not been met. The plaintiff claimed for the sum of \$1,230,207.55 against the bank. The plaintiff claimed that the said sum had been unlawfully and illegally debited against them. It contended that as holder in due course, the defendant was bound to honour the Bills, particularly since they had not challenged or protested against their validity. The Sr. Asst. Registrar dismissed the plaintiff's claim. The plaintiff appealed.

E Held, dismissing the plaintiff's appeal: in the letter of instructions on outward documentary Bills, it was clearly provided that the plaintiff was to refund the advance in case of non-acceptance or non-payment of Bill. These terms quite unequivocally refer to the position of the defendant bank as the collector, and therefore it would not be liable on the Bills unless they were met.

F CIVIL SUIT.

Chew Biman for the plaintiff/appellant.
Peter K.C. Yeo for the defendants.

Cur. Adv. Vult.

G **Abdul Razak J.:** This is an appeal by the plaintiff against the Senior Assistant Registrar's order dismissing their application for summary judgment. The plaintiff was the defendants' client. The defendants were a bank. Bills of exchange drawn by the plaintiff were presented to and received by the defendants. Later, the defendants found them to be dishonoured by the drawee. The defendants had earlier credited sums to the plaintiff's account for the amount shown in the Bills. Subsequently, however, the account was debited against the plaintiff, when it was found that the Bills had not been met. The plaintiff's claim against the defendants is for the sum of \$1,230,207.55, which had been unlawfully and illegally debited against them. It contended that as holders in due course, the defendants were bound to honour the

Bills, particularly since they had not challenged or protested against their validity.

The defendants refuted the claim and said that they were merely agents for collecting the Bills for the plaintiff and under the Act, were entitled to have recourse to the latter in the event of their being dishonoured. They did make advances to the plaintiff but at the plaintiff's specific request and instruction. They said there was nothing to prevent them from being the holder for value and the collector at the same time, whereby they were not bound to lodge a protest under the Act. They also said that the plaintiff by their conduct had, even if the defendants had acted wrongly, waived it.

It seems clear that whether the defendants were holders for value or merely a collector or whether they can be both a holder in due course and a collector are arguable and can only be fully and fairly resolved at a trial. The defendants said they were essentially collectors of the Bills. The plaintiff said the defendants were holder in due course and for value. The Bills have, however, clearly not been accepted by the drawee because they had not signed them which is one of the conditions for their enforceability. (Section 17 of the Bills of Exchange Act). The evidence seems to support quite strongly the case for the defendants being collectors because in the instruction given by the plaintiff to the defendants, called the letter of instructions on outward documentary Bill, it was clearly provided

"Against the above Collection, please advance us % of the draft amount and pay us the balance after collection. In case of non-acceptance or non-payment of the draft, we shall refund you the advanced amount together with interest at % p.a. immediately upon receipt of your advice It is understood and agreed that having exercised due care in the selection of any correspondent to whom the above mentioned item may be sent for collection you shall not be responsible for any act, omission, default, suspension, insolvency or bankruptcy of any such correspondent or sub-agent thereof, or for any delay in remittance, loss in exchange or loss of item or its proceeds during transmission or in the course of collection, until such time as actual payment shall have come into your possession. We engage to reimburse you for any advances made in anticipation of collection as well as disbursements made in effort to effect the same."

These terms clearly provide that the plaintiff was to refund the advance in case of non-acceptance or non-payment of the Bill. The defendants were not responsible as collectors for any

act until actual payment was made to them and the plaintiff was to reimburse the defendants for any advance made if it had been frustrated. These terms are clearly inconsistent with the allegation that the defendants were merely holders in due course of the Bills. Indeed, they quite unequivocally refer to the position of the defendants as the collector, and therefore they would not be liable on the Bills unless they are met.

I would, in the circumstances, therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chew Biman & Co.; Yeo & Yeo.*

CHANG LEE SWEE v. PUBLIC PROSECUTOR

[A. Cr. J. (Gunn Chit Tuan J.) March 15, April 3 to 6, April 21, 1984]

[Kuala Lumpur – Criminal Appeal No. 51 of 1982]

Criminal Law and Procedure – Criminal breach of trust by agent – Entrustment – Dishonest intention – Failure to consider defence evidence – Penal Code, s.409.

The appellant was charged for the offence of criminal breach of trust by an agent under section 409 of the Penal Code. The prosecution alleged that the appellant being an agent, namely the Executive Director of Finance of Trengganu Development and Management Berhad (TDMB) and in such capacity entrusted with the funds of the said company committed breach of trust by transferring the funds amounting to \$390,000.00 to another company called Klang Jaya Baru Development Berhad (KJDB) without the approval of the Board of Directors. The appellant was convicted and sentenced to imprisonment for three years by the Sessions Court at Kuala Lumpur.

The appellant appealed. It was contended (a) that the learned President erred in law and in fact in holding that the prosecution had at the close of the case for the prosecution discharged the burden of proof upon it and that the learned President was wrong in holding that the appellant was entrusted with the funds of the TDMB; (b) that the learned President erred in holding that the appellant had acted dishonestly in authorising the four payments forming the subject-matter of the charge (c) that the learned President had failed to consider all the evidence that was before him and had also failed to consider fully the defence case.

Held: (1) if both the documentary and oral evidence in the case had been carefully considered, the learned President would have come to the conclusion that the appellant, even after he was appointed an executive director in charge of financial affairs, was not in a position to manage the